IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 718 746

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

GEORGE W. HOWARD, JR., *President,*
S. J. HOLDERMAN, *Secretary-Treasurer,*
LYLE WHEELER, *First Vice President,*
LEE E. DANIELS, *Second Vice President,*
WILLIAM M. CARROLL, *Third Vice President,*
Illinois State's Attorney's Association,
JOHN J. BRESEE,
HAROLD C. JONES,
WILLIAM T. HENDERSON,
Special State's Attorney's Association Committee,
THOMAS SWEENEY,
Member of Association Representing the Above.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. .....

EDWARD D. MARKHAM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EARLE G. H. CROMER, THE VILLAGE OF MAYWOOD, A MUNICIPAL CORPORATION, EARLE K. BROBERY, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, THOMAS E. BARRETT, HARRY M. GERHARD, VERNON V. SMITH, MILTON SEBASTIAN, FRANK H. GAY, AND RICHARD W. BAUR, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, CLARENCE A. TEVANDER, INDIVIDUALLY AND AS CLERK OF THE VILLAGE OF MAYWOOD,

Respondents.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorable Supreme Court of the United States and to the Honorable Harlan F. Stone, Chief Justice:

I.

George W. Howard, Jr., President, S. J. Holderman, Secretary-Treasurer, Lyle Wheeler, First Vice President, Lee E. Daniels, Second Vice President, and William M.

Carroll, Third Vice President, officers of the Illinois State's Attorney's Association and John J. Bresee, Harold C. Jones, William T. Henderson, special committee appointed by said Association, all by Thomas Sweeney, member of said Association representing the above, move this Honorable Court for leave to appear *amicus curiae* in support of the petition for *certiorari* filed in this cause by Edward D. Markham and respectfully show:

1. This Association consists of the State's Attorneys of the various Counties of the State of Illinois. During the past year at least eight of its members, representing eight different Counties of the State of Illinois, have been inducted into the Army of the United States. The question presented therefore, by the petition relates directly to the title, right, privilege or immunity possessed by those elected State's Attorneys and a decision upon the question will act, not only upon the title of those who have already been so inducted, but also upon those members of this Association who in the future may be so inducted.

2. The State's Attorneys of the various Counties comprising this Association are charged by operation of the laws of the State of Illinois with the duty of attending upon Grand Juries, preparing indictments, prosecuting cases, advising County Officials, defending any actions or proceedings brought against the County or any County or State officer in his official capacity within his County and appears on behalf of the County in all matters to which it is a party or in which it or the People of the State is interested.

The question presented therefore, by the petitioner is involved with respect to situations of other elected officials of the State of Illinois wherein the same question as to the tenure of citizens elected who may be inducted into the armed forces of the United States is involved.

3. In the various Counties in the State of Illinois where the State's Attorney of the respective County, has been inducted into the armed forces, the Board of Supervisors of said County has by appropriate reso-

lution granted to the elected State's Attorney or other county officials involved, a formal leave of absence during the term of his service in the armed forces and by like resolution have provided for the discharge of the duties of the office by an assistant or assistants appointed by such elective official and approved by the Board of Supervisors of such County.

4. That by reason of the decision of the Supreme Court of the State of Illinois of this case, questions have been raised as to the power of the assistant or assistants carrying on the work of such elected officials, during the term of the leave of absence of such officer.

In one instance where the authority of the assistant so appointed to act, was questioned, both directly and collaterally, the elected official tendered a formal resignation to avoid the confusion resulting from the attacks made upon the acts of his assistant. By such resignation the County is put to the expense of a formal election to fill the vacancy created by such resignation, which situation would not have occurred but for the decision of the Illinois Supreme Court in this case.

5. That the work and duties of the County officials can and will be carried on without public inconvenience, by an assistant or assistants appointed and qualified to perform such work and duties; and in the event of the citizen elected to fill such County office terminating his service with the armed forces, he would return to fill out the remainder of the term for which he had been elected.

6. To hold that a citizen elected to an office under the authority of the State, by entering the armed forces, produces a vacancy in such elective office, operates to deprive the citizen of his right to have his status preserved as an elected official with the right to resume his duties upon his discharge from the armed forces.

7. That in no case has there been claim made by such inductee into the Army of the United States, to

collect or receive compensation during his leave of absence, but the compensation, fees and emoluments of the office have been paid to the assistant or assistants carrying on the work during the term of such leave of absence.

8. The decision of the Illinois Supreme Court is directly contrary to the decisions of the courts of other states, some of which are cited and set forth in the brief filed in support of said petition for *certiorari*.

9. It is respectfully urged that it was never the intent or purpose of Section 3, Article IV of the Illinois State Constitution (petition, page 3) to discourage such officials from rendering military service, to deter them from answering or to induce them to evade, such a call; because to do so would tend to impede the Federal Government in its efforts to mobilize its citizens and interfere with the efforts of the United States to meet the existing unprecedented major emergency. The primary object and purpose and proper construction of Section 3, Article IV of the Illinois State Constitution was to prohibit one person from holding two separate distinct incompatible offices, one under the state and the other under the United States. The acceptance of a commission in the United States armed forces is not the acceptance of an office of honor or profit incompatible with the holding of an office of honor or profit under the authority of the state.

Should this section of the Illinois State Constitution be interpreted as having application to the citizen holding office under authority of the state, retaining that office after accepting and while holding a commission in the armed forces of the United States, it would operate as an involuntary forfeiture by the citizen of his state office because of his answering the call to military service which it would be unlawful and unpatriotic for him to decline. Such a construction is a reflection both upon the intelligence and the patriotism of those responsible for the incorporation of this provision in the State Constitution.

10. A discussion of the distinction between accepting a commission in the Army of the United States in

the present emergency, and the acceptance of a commission in the Regular Army appears in Volume 22 of the Opinions of the Attorney General of the United States at page 88.

The Supreme Court of Texas in the case of *Cramer* v. *Sheppard*, 167 S. W. (2d) 147 is an authority additional to those cited in the brief filed in support of the petition for writ of *certiorari*, that the acceptance of a commission in the armed forces of the United States does not vacate a state office which the citizen so commissioned was holding under the state law.

It is obvious that this Nation is now engaged in the greatest war of its history, a struggle for its very existence. The interpretation of that section of the Illinois State Constitution as urged by the petitioner will result in giving to our armed forces, the services of men it might otherwise be more difficult to obtain. This interpretation will permit more to offer their services under circumstances holding that they can resume the duties of their civil offices when the war is over if his term of office has, as yet not expired.

We respectfully submit that such a construction is but logical and is in the best interests of both the United States and of the State of Illinois.

WE THEREFORE, RESPECTFULLY, urge that the petition for the writ of *certiorari* to the Supreme Court of the State of Illinois, heretofore filed in this cause be allowed and that this Honorable Court review and determine the judgment and decree in said cause so that said judgment of the Supreme Court of the State of Illinois may be reversed by this Court.

At a meeting of the Illinois State's Attorney's Association, held in the City of Springfield, Illinois, on February 19 and 20, 1943, it was unanimously authorized by the Association that the undersigned in their own behalf and in behalf of the Association, file and present this motion

for leave to appear and be heard *amicus curiae* in support of said petition and the prayer thereof.

Respectfully submitted,

GEORGE W. HOWARD, JR., *President,*
S. J. HOLDERMAN, *Secretary-Treasurer,*
LYLE WHEELER, *First Vice President,*
LEE E. DANIELS, *Second Vice President,*
WILLIAM M. CARROLL, *Third Vice President,*
Illinois State's Attorney's Association,

JOHN J. BRESEE,
HAROLD C. JONES,
WILLIAM T. HENDERSON,
Special State's Attorney's Association Committee,

THOMAS SWEENEY,
Member of Association Representing the Above.